IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 1414 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE S.K.KESHOTE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

STATE OF GUJARAT

Versus

RAO CONSTRUCTION CO.

Appearance:

MR DP JOSHI for MR SP HASURKAR for Petitioners

MR HK PARMAR for Respondent No. 1

CORAM : MR.JUSTICE S.K.KESHOTE

Date of decision: 22/02/2000

ORAL JUDGEMENT

#. The petitioners, by this revision application under Section 12 of the Gujarat Public Works Contracts Disputes Arbitration Tribunal Act, 1992 challenges the judgment dated 5/2/1999 of the Gujarat Public Works Contracts

Disputes Arbitration Tribunal at Ahmedabad in Arbitration Reference No.86/96. Under this judgment the Tribunal directed the petitioner to pay Rs.46,030/= to the respondents along with the interest @12% p.a. from 22/2/1988 till realisation. The cost has also been awarded togetherwith interest thereof @12%.

#. The defendant-respondent made as many as six claims. The aggregate of the same is Rs.91,785/=. The interest has also been claimed. Under the judgment as against this claim, the Tribunal has accepted the claim of Rs.46,030/= break-up of which are as under :-

(i) Refund of penalty Rs. 4,000/=
(ii) Recovery towards non-return Rs. 6,000/=
of empty asphalt drums
(iii) Amount withheld from R.A Bills Rs. 3,000/=
(iv) Excess recovery of asphalt Rs.33,030/=

TOTAL Rs.46,030/=

#. During the course of the arguments Shri Joshi, learned counsel for the petitioner given up the challenge made to the claim Nos. (i) and (iii). So, the matter is considered only with reference to the claims at Sr. Nos.(i) and (iv).

#. The learned counsel for the petitioner contended that the learned tribunal has committed a serious illegality in holding that the recovery of Rs.6,000/= made by the petitioner towards non-return of the empty asphalt drums is illegal. In his submission, as per terms of the Contract the empty asphalt drums are to be returned. The respondent has not produced any cogent and satisfactory evidence for this claim. In his submission merely because no dues certificate is given this claim of the respondent could not have been granted. Assailing the grant of Rs.33,030/= the amount of the excess recovery of the asphalt cost, the learned counsel for the petitioner contended that the final bill was prepared and against that bill the petitioner has not raised any objection or protest. After more than 14 months of the actual completion of the work the objections and protests are raised.

#. Shri Joshi, learned counsel for the petitioner urges that different standards have been applied by the Tribunal while deciding these claims of the respondent. In the case of the claim of the respondent regarding cost of the empty asphalt drums the final bill was taken to be

sword but in the claim of the cost of the asphalt this final bill was not given any importance. This is clearly what Mr. Joshi contends a contradictory approach in the matter.

#. Shri Parmar in contra contended that once a no objection certificate has been given the petitioner could not have raised any claim for the cost of the empty bags. It is contended that at no point of time till the preparation of final bills or thereafter it is pointed out to the respondent that the empty drums have not been returned. In reply to the second claim, the learned counsel for the respondent submitted that the asphalt in the bulk has to be supplied to the petitioner but in packed drums have been supplied for which the respondent is not at fault. The department has not taken timely steps to produce order with the manufacturers of asphalt for supply thereof in bulk. As a result of this inaction or omission on the part of the petitioner the respondent has suffered. In his submission the petitioner furnished sufficient explanation for not objecting or protesting in this respect at the time of final bill.

#. I have given my thoughtful consideration to the rival contentions of the learned counsel for the parties.

#. The claim of the respondent-contractor for Rs.4,320/= has not been accepted though final bill has been prepared and to which no due certificate was enclosed on two grounds that the receipt is not coming and second if this payment is made then it must be for 108 drums, which is remained from 258 after deducting 150 drums which means he paid the amount for the drums which were not returned. The same analogy is equally applicable to the claim which has been made by the respondent for Rs.6,000/=, the cost of 150 drums. The respondent-contractor has not produced a receipt for deposit of 150 drums with the petitioner's office. In the absence of the receipt, part of the claim of the petitioner was not accepted by the Tribunal I fail to see any logic, justification and reasonableness in the approach of the Tribunal to accept the claim of the respondent-contractor for Rs.6,000/= for which the receipt is also not produced. The Tribunal has not given out any cogent and justified reason to grant this claim of Rs.6,000/= of the respondent-contractor. It is accepted as a fact by the Tribunal that the receipt of return of 150 drums is not coming on the record. The respondent-contractor before the Tribunal has not produced any evidence oral or documentary in support of his claim that 150 empty drums of asphalts were deposited by him with the petitioner. The judgment of the Tribunal

to the extent where it accepted the claim of Rs.6,000/= of the respondent-contractor under the head of recovery towards nonreturn of empty asphalt drums cannot be allowed to stand and accordingly it is quashed and set aside.

#. Re. claim on account of excess recovery of asphalt. This claim of the respondent-contractor deserves no acceptance on the ground that he has not raised any objection or protest for his this claim at the time of the preparation of final bill. Before the learned Tribunal an explanation has been furnished "at the time of final bill the respondent was under the influence of the officers of the department and it did not take any objection or protect". But it is too difficult to believe what to say to accept this defence. The respondent-contractor is not a layman. It is a company and it deals with this type of contracts from time to time. This claim has been made after more than 14 months after the date of actual completion of work. The Tribunal has not considered another important aspect. At the time of supply of packed asphalt drum to the petitioner by the department in place of bulk asphalt the petitioner has not raised any objection or protest. The petitioner has accepted the supply of the packed drum asphalt from the department in place of bulk asphalt and now after more than 14 months of completion of work and preparation of final bill it has come up with all these grievances and making this claim. The respondent-contractor has failed to make out any case of the compulsion to use packed drum asphalt in place of bulk supply. Reliance placed by the Tribunal on its decision given in Transferred Arbitration Reference No.85/96, which was a matter altogether relating to a separate contract, may be for the same work. In that case if the respondent produced evidence and established that it was compelled to use packed drums asphalt in place of bulk asphalt for no fault of it certainly the Tribunal would have justified to accept this claim but in this case that reasoning given cannot be applied. Each case has to be decided on its own facts and the evidence produced by the parties. It is a question of fact whether this packed drums asphalt has been used by the respondent in place of bulk asphalt under some compulsion of the department. The finding given by the Tribunal to accept this claim of the respondent-contractor is wholly perverse and the same cannot be allowed to stand.

##. As a result of the aforesaid discussion, this revision application succeeds and the same is allowed in part and the claim of the respondent-contractor under the

heads on account of recovery from the security deposit towards the cost of 150 empty drums and excess recovery of asphalt are disallowed. Rule is made absolute accordingly. However, in the facts of this case, no order as to costs.

(S.K.Keshote, J.)

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